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No. 89-702

In The

Supreme Court of the United States

October Term, 1989

CHAMPION MORTGAGE COMPANY,

Petitioner,

v.

LAKE TRAVIS ISLAND, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARC O. KNISELY
McGINNIS, LOCHRIDGE & KILGORE

1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982
Counsel of Record

ARVIND J. SUDARSHAN
McGINNIS, LOCHRIDGE & KILGORE

1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982
Counsel For Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether petitioner preserved its present procedural complaint in the courts below.

(2) Whether a Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction submitted on affidavits may properly be decided by the district court by applying a *prima facie* burden of proof.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Champion Mortgage Company and respondent The Lake Travis Island, Ltd. The Lake Travis Island, Ltd. has no affiliates, parents or subsidiaries required to be listed by Rule 28.1.

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RULES INVOLVED

In addition to the constitutional and statutory provisions and rules cited by petitioner, the following local rule of the United States District Court for the Western District of Texas is pertinent to decision of this case:

> Rule 300-5(h) **Oral Hearings**. A movant or respondent may specifically request an oral hearing, but the allowance of an oral hearing shall be within the sole discretion of the judge to whom the motion is assigned.

STATEMENT OF THE CASE

1. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was instituted by Respondent The Lake Travis Island, Ltd. ("Respondent" or "Lake Travis") as Plaintiff in state district court in May, 1987. (R. 165). Petitioner Champion Mortgage Company ("Petitioner" or "Mortgage Company"), as Defendant, removed the cause to federal court on June 23, 1987, and, two weeks later, moved to dismiss on the ground that personal jurisdiction in Texas allegedly was lacking; or alternatively for change of venue. (R. 133, 160). Defendant Mortgage Company submitted with the motion an affidavit attested to only on "information and belief" by its president, Mr. Vincent L. Coniglio. (Mortgage Company's Petition at Appendix C, R. 112, 117). Plaintiff Lake Travis filed a response to the motion that included the affidavit of Mr. Glenn D. Reschke, senior vice president of The Prime Group, Inc., general partner of Plaintiff Lake Travis. (Petition at Appendix D, R. 138, 150).

The federal district court denied Defendant Mortgage Company's motion to dismiss or transfer venue on September 23, 1987. (R. 102-111).

On February 1, 1988, Plaintiff Lake Travis submitted interrogatories and a request for the production of documents to Defendant Mortgage Company. (See R. Vol. 2). After trying unsuccessfully to resolve disputes over responses to the discovery requests, Plaintiff Lake Travis moved to compel the production of certain documents and answers to certain interrogatories. (R. 50). No response to the motion was filed.

In May, 1988, Plaintiff Lake Travis noticed the depositions of three officers of Defendant Mortgage Company, including Mr. Coniglio, to be conducted on June 6, 1988. (R. 33). The witnesses failed to appear. Accordingly, Plaintiff Lake Travis moved for sanctions, including the striking of Defendant Mortgage Company's pleadings and rendition of judgment against it. (R. 33). No response to the motion was filed.

Orders rendered by the magistrate and the federal district court on July 6, August 11, and September 15, 1988, directing compliance with deadlines for discovery and for payment to Plaintiff Lake Travis of $3,215.00 in costs and attorneys' fees for discovery abuse, were ignored by Defendant Mortgage Company. (*See* R. 33 and docket sheet). On September 29, 1988, Plaintiff Lake Travis moved for default judgment because of the continuing failure of Defendant Mortgage Company and its counsel to comply with the court orders. (R. 37). No response to the motion was filed.

On October 31, 1988, the district court rendered an order that recited the lengthy history of delay, discovery abuse, and disregard of the district court's orders by Defendant Mortgage Company and its counsel. The court then concluded,

> The Court is of the opinion that *there is a clear record of delay and contumacious conduct by Defendant and his counsel over a period of at least four months.* . . . Given Defendant's failure to comply with the Court's earlier orders that imposed monetary sanctions, but refrained from the more serious sanctions authorized by Rule 37(b)(2)(C), the Court is of the opinion that a lesser sanction will not have the desired result. Plaintiff has certainly been substantially prejudiced in preparing for trial by Defendant's refusal to respond fully to specific interrogatories and requests for production, and by Defendant's failure to produce its president, [Mr. Coniglio,] a loan officer, and a Rule 30(b)(6) witness for deposition. There is absolutely no indication that Defendant's failure to comply results from honest confusion, sincere misunderstanding of the orders, inability to comply, or nonfrivolous assertion of a constitutional right. Finally, the Court is of the opinion that the neglect is not completely attributable to Defendant's attorney. The interrogatories and requests for production were directed towards the Defendant, and Defendant's officers were noticed for depositions. Surely, Defendant is not the blameless client of a neglectful attorney.

(R. 35-36, emphasis added). Accordingly, the court ordered that Plaintiff Lake Travis' motion for default judgment be granted.

Plaintiff Lake Travis moved for entry of judgment, pursuant to the court's October 31, 1988 order, on

November 15, 1988. (R. 28). No response to the motion was filed. The district court rendered final judgment on December 14, 1988, and awarded to Plaintiff Lake Travis $33,000 in actual damages and $66,000 in additional statutory damages, pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act, plus interest, attorneys' fees, and costs. (R. 2).

Defendant Mortgage Company appealed to the United States Court of Appeals for the Fifth Circuit solely from the district court's decision on its initial motion to dismiss for lack of personal jurisdiction. Defendant Mortgage Company presented the single issue of whether the district court's exercise of jurisdiction comported with the due process clause of the fourteenth amendment to the Constitution. The court of appeals summarily affirmed the decision of the district court in an unpublished opinion. After obtaining leave to file its petition for writ of certiorari in this court late, Defendant Mortgage Company filed its petition on October 26, 1989. Counsel for respondent received this petition on October 28, 1989.

2. STATEMENT OF FACTS

Plaintiff Lake Travis is a Texas limited partnership located in Austin, Travis County, Texas. The general partner of Plaintiff Lake Travis is The Prime Group, Inc., an Illinois corporation authorized to do business in Texas and actually doing business in Austin, Travis County, Texas. (R. 167).

Plaintiff Lake Travis is the owner and developer of a condominium project on Lake Travis in Travis County, Texas. In 1986, Plaintiff Lake Travis was in the market for

a permanent "end loan" commitment. (Petition at Appendix D, R. 150). This type of commitment "is a long term mortgage vehicle used to provide debt financing to purchasers of individual residential units." (Petition at Appendix C, R. 113).

Defendant Mortgage Company is incorporated in the State of California. (R. 167). Defendant Mortgage Company sent brochures and other documents and communications to Plaintiff Lake Travis in Texas soliciting Plaintiff Lake Travis' business. The brochures and other communications also described "numerous other projects" in Texas for which Defendant Mortgage Company was providing permanent financing. (Petition at Appendix D, R. 152).

On or about May 15, 1986, one of Plaintiff Lake Travis' representatives in Austin, Texas, Mr. Reschke, spoke by telephone with a representative of Defendant Mortgage Company in California. (Petition at Appendix D, R. 150). In subsequent telephone communications between representatives of the parties in the two states Plaintiff Lake Travis outlined its requirements for an end loan commitment. Defendant Mortgage Company sent an application for a loan commitment to Plaintiff Lake Travis that was received on September 3, 1986 in Texas. (Petition at Appendix D, R. 150-151).

On September 9, 1986, Plaintiff Lake Travis wrote to Defendant Mortgage Company requesting a commitment under specified terms and conditions. At the insistence of Defendant Mortgage Company, Plaintiff Lake Travis sent with the letter a check in the amount of $33,000.00, that constituted $30,000.00 as a good faith deposit on the proposed commitment fee and $3,000.00 as a good faith

deposit on site inspection fees. The September 9 letter stated:

> It is agreed that [Defendant Mortgage Company] will in accepting such funds have thirty days from the date of this letter in which to secure a commitment which is consistent with the terms and conditions contained herein or such other terms and conditions that may be acceptable to applicant. Unless such satisfactory commitment as set forth above is received by the applicant within thirty days of the date of this letter, *[Defendant Mortgage Company] agrees to refund any and all funds paid to [Defendant Mortgage Company] including the good faith deposit and site inspection fee less any actual costs incurred by [Defendant Mortgage Company] to conduct a site inspection.* In no case shall such inspection costs exceed $3,000.00.

(Petition at Appendix D, R. 151, emphasis added).

Negotiations over the terms of a possible commitment continued after the September 9 letter, with numerous written and telephonic communications back and forth between Texas and California, including offers made by Defendant Mortgage Company and delivered to Plaintiff Lake Travis in Texas. (Petition at Appendix D, R. 151-153; Petition at Appendix C, R. 115-116). During the negotiations, personnel from Defendant Mortgage Company traveled to Texas and inspected Plaintiff Lake Travis' condominium project. (Petition at Appendix D, R. 152; Petition at Appendix C, R. 116).

The proposed commitment delivered by Defendant Mortgage Company to Plaintiff Lake Travis contained California choice of law and choice of forum clauses, but, as acknowledged by Defendant Mortgage Company, the

responses from Plaintiff Lake Travis delineating its requirements for the proposed commitment "omitted the choice of forum and choice of law clause[s]." (Petition at Appendix C, R. 114-115). Plaintiff Lake Travis

> never agreed to any choice of forum or choice of law clause. To the contrary, the offer and counteroffers made by Lake Travis to [Defendant Mortgage Company] specifically excluded any choice of forum or choice of law clause.

(Petition at Appendix D, R. 152-153).

If the parties had agreed upon the terms of a permanent loan commitment, Defendant Mortgage Company

> could reasonably have been involved in a *continuing relationship of approximately thirty years' duration with individual buyers of condominium units* at the Lake Travis project. . . .

(Petition at Appendix D, R. 151). Even in the application phase, Defendant Mortgage Company required "financial and market data" about the Texas project. (Petition at Appendix C, R. 113). Subsequently, Defendant Mortgage Company intended to obtain "loan applications and documents from potential purchasers of developer's units." Additionally, Defendant Mortgage Company intended to open escrow accounts in Travis County and to file the title and mortgage documents in the deed records of Travis County. (Petition at Appendix C, R. 113-114). Furthermore, Defendant Mortgage Company was amenable to the idea of providing "an on site loan representative or agent to discuss loans with buyers at the Lake Travis Project in the event a satisfactory commitment was forthcoming." (Petition at Appendix D, R. 152). In short, "[b]oth Lake Travis and [Defendant Mortgage Company]

personnel expected that their relationship within the State of Texas would be substantial and continuing." (Petition at Appendix D, R. 152).

At no time did Defendant Mortgage Company provide a commitment conforming to Plaintiff Lake Travis' specified requirements, and consequently a financing agreement was not consummated. After repeated demands by Plaintiff Lake Travis for the return of its deposits, Defendant Mortgage Company wrote a letter on December 9, 1986 refusing to return the $33,000.00. (Petition at Appendix D, R. 153). Counsel for Plaintiff again demanded return of the deposits by a letter that also gave notice of a potential claim under the Texas Deceptive Trade Practices-Consumer Protection Act. (R. 170). Defendant Mortgage Company persisted in its refusal to return the $33,000.00, and this suit was filed in Texas on May 15, 1987. (R. 165, 167).

REASONS FOR DENYING THE WRIT

1. PETITIONER HAS FAILED TO PRESERVE THE ERROR COMPLAINED OF FOR REVIEW BY THIS COURT

It is an elementary rule of practice in this Court that in order to secure review of a legal issue through a writ of certiorari, that issue must first be presented to the lower federal courts in all but the most exceptional circumstances. *Youakim v. Miller*, 425 U.S. 231 (1976). This Court has made clear that it will not review questions presented for the first time to the Supreme Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question presented in

petition but not in court of appeals is not properly before the Court).

Petitioner frames the question presented here as: "whether . . . a Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction can be decided by applying a *prima facie* burden of proof. . . ." Yet petitioner did not present this question to either the district court or the court of appeals.

In the district court petitioner filed a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), Federal Rules of Civil Procedure ("FRCP") (R. 133, 160). Petitioner submitted an affidavit in support of its motion. (R. 112, 117). At no time did petitioner file a request for oral argument or an evidentiary hearing on this motion, even though a party seeking oral argument is required to do so by local rules. (See Western District of Texas Local Rule 300-5(h)). Nor did petitioner complain at any time of the district court's decision, under Rule 43(e), FRCP, to decide this motion on the basis of the affidavits presented.

The record in the court of appeals is equally clear. Petitioner never squarely addressed the procedural issue presented here in its briefs and only cursorily discussed Rule 43(e), FRCP, the standard for ruling upon the motion, or the district court's decision to decide the motion on the basis of affidavits. Indeed petitioner's complaints about the court of appeals' decision in *D. J. Investments v. Metzeler Motorcycle Tire*, 754 F.2d 542 (5th Cir. 1985), appear for the first time in its petition.

Under these circumstances alone, petitioner has waived its right to this Court's review of the question presented.

2. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED

A. Petitioner misstates the procedure and standard for deciding a motion to dismiss for lack of personal jurisdiction.

The standard applied by the courts of appeals for deciding a motion to dismiss for lack of personal jurisdiction submitted on affidavits is clear: where the motion is ruled on prior to trial and without a full evidentiary hearing, the plaintiff is only required to make a *prima facie* showing of jurisdiction, but must still prove jurisdiction at trial by a preponderance of the evidence. *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986), *modified* 836 F.2d 850 (1988); *accord Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 n. 2 (9th Cir. 1977); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981).

Petitioner's argument that the district court was somehow required, in the absence of any request, to hold an evidentiary hearing or mini-trial on the issue of personal jurisdiction is not only at odds with the practice in federal courts, it directly contravenes the mandate of Rule 43(e), FRCP. That rule provides:

> When a motion is based on facts not appearing of record *the court may hear the matter on affidavits presented by the parties.* (emphasis added).

If petitioner is complaining that it was never allowed to present evidence at trial, the matter is easily explained. The district court entered a default judgment against petitioner for repeated contumacious conduct in failing to respond to discovery requests. (R. 35-36). Having refused to participate in the discovery process, petitioner can hardly complain that it was deprived of the opportunity to litigate the jurisdictional question more completely.

B. The procedure applicable to deciding these motions in the Court of Appeals for the Fifth Circuit is not in conflict with the decisions of other courts of appeals.

The procedure for dealing with these motions in the Fifth Circuit is far from anomalous. At least seven courts of appeals apply an identical procedure. *Reuber v. U.S.*, 750 F.2d 1039 (D.C. Cir. 1984); *Cutco Industries v. Naughton*, 806 F.2d 361 (2d Cir. 1986); *American Greetings Corp. v. Cohn*, 839 F.2d 1164 (6th Cir. 1988); *Turnock v. Cope*, 816 F.2d 332 (7th Cir. 1987); *Institutional Food Marketing v. Golden State Strawberries*, 747 F.2d 448 (8th Cir. 1984); *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984); *Ten Mile Indus. Park v. Western Plains Service Corp.*, 810 F.2d 1518 (10th Cir. 1987). Indeed, the Fifth Circuit's opinion in *Travelers, supra*, expressly recognizes and adopts the Ninth and Second Circuits' decisions in *Data Disc, supra*, and *Marine Midland, supra*, two cases cited by petitioner in support of an alleged conflict between the Fifth, Second and Ninth Circuits. Far from representing a conflict between circuit courts of appeals, this procedure represents uniformity of decision among federal appellate courts.

3. THE PROCEDURE EMPLOYED BY THE COURTS OF APPEALS COMPLIES WITH CONSTITUTIONAL DUE PROCESS REQUIREMENTS

In seeking to raise a constitutional issue, petitioner has misstated the burden of proof applicable to a determination of personal jurisdiction. Petitioner exhorts this Court to restrain

> the aggressive Fifth Circuit rule for deciding these cases which avoids this Court's standards by adopting a burden of persuasion (sic) as to *in personam* jurisdiction which results in the issue being resolved in favor of plaintiffs on a *prima facie* showing. (Petition 22).

However, that is not the way the Fifth Circuit or any other circuit deals with the issue of personal jurisdiction.

The courts of appeals uniformly hold that "a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence." *Forsythe v. Overmeyer*, 576 F.2d 779, 781 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978). The Second Circuit succinctly explained the rule applied throughout the courts of appeals:

> If the court chooses not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials. Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial. But until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981); *accord Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986), *modified* 836 F.2d 850 (1988).

Petitioner has confused the burden of proof placed upon a plaintiff in a pretrial motion to dismiss supported by affidavits with the ultimate burden of proof a plaintiff bears at trial. Where the court is asked to decide a pretrial motion to dismiss on the basis of affidavits, a plaintiff need only make a *prima facie* showing of jurisdiction, but at trial a plaintiff must prove the existence of personal jurisdiction by a preponderance of the evidence.

No other rule makes sense. As plainly stated by the Court of Appeals for the Ninth Circuit:

> If the court determines that it will receive only affidavits or affidavits plus discovery materials, these very limitations dictate that a plaintiff must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss. Any greater burden – such as proof by a preponderance of the evidence – would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials. Thus a plaintiff could not meet a burden of proof requiring a preponderance of the evidence without going beyond the written materials. Accordingly, if a plaintiff's proof is limited to written materials, it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.

Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280 (9th Cir. 1977) (footnotes and citations omitted).

CONCLUSION

Petitioner has waived any claim that the procedure used by the district court to decide its motion to dismiss was in error. The district court's procedure is constitutionally sound, follows the letter of the Federal Rules of Civil Procedure and conforms with the decisions of all courts of appeals addressing the issue.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARC O. KNISELY
McGINNIS, LOCHRIDGE & KILGORE

1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

Counsel Of Record

ARVIND J. SUDARSHAN
McGINNIS, LOCHRIDGE & KILGORE

1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

Counsel For Respondent